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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 106

CAMPBELL SOUP COMPANY,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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28 U. S. C. 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. .....

CAMPBELL SOUP COMPANY,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL-CIO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Campbell Soup Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on February 11, 1969. The Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois which had ordered enforcement of an arbitration award made under a collective bargaining agreement between Petitioner (hereinafter sometimes called the "Company") and the International Association of Machinists, District No. 8, AFL-CIO (hereinafter called the "Union").

OPINION BELOW.

The opinion of the court below, not yet reported, is set forth in Appendix A hereto. The opinion of the District Court for the Northern District of Illinois, not officially reported, is set forth in Appendix B hereto. The arbitrator's award is attached as Appendix C.

JURISDICTION.

The judgment of the court below was made and entered on February 11, 1969 (App. A, *infra* p. A8). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED FOR REVIEW.

Whether an arbitrator violates the standards enunciated by this Court in *United Steelworkers* v. *Enterprise Wheel & Car Corp.*,[1] and dispenses his "own brand of industrial justice" when he

(a) disregards a long-standing plant rule, acquiesced in by the union, because he concludes, without reference to the bargaining agreement, that the rule is unreasonable, and

(b) relies on post-discharge conduct of an employee in determining that the employee's discharge was unjustified.

STATUTE INVOLVED.

Section 301(a) of the Labor Management Relations Act, as amended, 61 Stat. 156, 29 U. S. C. 185(a), provides as follows:

"Suits for violation of contracts between an em-

1. 363 U. S. 593 (1960).

ployer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

A. Nature of the Case and Its Disposition.

This action was brought under Section 301(a) of the Labor Management Relations Act, *supra,* by the Union against Petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, to enforce an arbitration award directing Petitioner to reinstate a discharged employee to his former employment status. Petitioner counterclaimed to vacate the arbitration award as invalid and unenforceable (App. A, *infra* p. A2). The District Court granted the Union's motion for summary judgment and ordered the Company to comply with the arbitration award (App. B, *infra* pp. A9-A11). The United States Court of Appeals for the Seventh Circuit affirmed the District Court's judgment (App. A, *infra* p. A8).

B. Facts.

The Company and the Union at all times material herein were parties to a collective bargaining agreement providing for the resolution of disputes through a grievance procedure, culminating in binding arbitration. The Agreement also contained the following provision (App. A, *infra* p. A6 n. 5):

"SECTION XII

OBJECTIVES OF MANAGEMENT AND EMPLOYEES

1. It is agreed that the Union, the employees and the members of the Management staff shall do everything within their power to

(1) improve the products of the Company;

(2) improve the efficiency of manufacturing;

(3) conduct themselves individually and collectively so as to reflect favorably on the business and improve the public standing of the Company and of the Union;

(4) promote the sale of the Company's products through grocery stores to the general public."

On February 23, 1966, Bruno Kmiec, an employee of the Company at its Chicago plant, and a member of the Union, was arrested on the Company's premises and charged with gambling in violation of the Illinois Criminal Code. Thereafter Kmiec pleaded guilty at a trial held in an Illinois State Court and was convicted, fined and placed on one year's probation (App. C, *infra* p. A13).

On March 21, 1966, based upon his plea of guilty and his conviction, the Company discharged Kmiec from its employ. The Company relied on Rule 7 of its published plant rules, which had been in effect for more than 20 years. Rule 7 provides for immediate dismissal on the first offense for "[v]iolation of any penal law on the premises" (App. C, *infra* p. A17). Kmiec's discharge was challenged by the Union under the contractual grievance procedure.

On December 12, 1966, a hearing was held before an arbitrator mutually selected by the Company and the Union to determine "Was the discharge of Bruno Kmiec on March 31, 1966, for cause and if not, what remedy is appropriate" (App. C, *infra* p. A13). The arbitrator issued an award

on May 24, 1967, in which he found (a) that Kmiec admitted taking and placing horse-racing bets ("book-making") on the Company's premises on a daily basis over a considerable period of time, (b) that Kmiec's plea of guilty in the state criminal proceeding was to a charge of illegal acts committed on the Company's premises, and (c) that Kmiec knowingly and continuously engaged in gambling activities on the Company's premises (App. C, *infra* p. A18).

Nevertheless, the arbitrator held that Kmiec's discharge had not been for just cause and ordered reinstatement without back pay. He based his decision on his determination that Rule 7 was unreasonable,[2] that Kmiec's conviction was for a "lesser" penal offense and that Kmiec's record with the Company had otherwise been good. He further stated that his decision was founded on the premise that Kmiec had learned his lesson and would henceforth conduct himself in an exemplary manner (App. C, *infra* p. A19).

C. Decisions Below.

Upon an action to enforce the arbitrator's award, the District Court granted the Union's motion for summary judgment and, on April 11, 1968, ordered the Company to comply with the award. In its accompanying Memorandum of Decision, the District Court observed that an arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement" (App. B, *infra* p. A10). However, without commenting on whether the essence of the arbitrator's award was drawn from the applicable labor agreement, the court found that the arbi-

2. The arbitrator compared Rule 7 with Rule 30, which provides a two day suspension for gambling on the premises. He resolved any "ambiguity" between the two rules by noting that Rule 7, as previously applied, pertained to criminal "convictions" of penal violations (App. C, *infra* p. A18). Nevertheless, the arbitrator felt that Rule 7 should apply only to "serious" penal violations, as more fully discussed on p. 9 herein.

trator had not acted arbitrarily or capriciously, or exceeded his jurisdiction, and that his award did not contravene public policy (App. B, *infra* pp. A9-A11).

In affirming the decision of the District Court, the Court of Appeals said (App. A, *infra* p. A6):

> "The arbitrator could have thought with good reason, as he apparently did, that sustaining the discharge in the light of Kmiec's record, of the modern tolerant view of gambling, and of the 'disproportionate' sanctions in Rules 7 and 30, might adversely affect employee morale and even Campbell's public image. There is nothing in the parts of the agreement referred to, or in the decisions, that preclude this reasoning by the arbitrator, presumably selected because he was informed about identical matters which fitted him for the kind of reasoning he used in resolving the issue."

The Court of Appeals concluded that the arbitrator had not exceeded his authority (App. A, *infra* p. A7).

D. Basis for Federal Jurisdiction.

This action involves a claim of contract violation within the meaning of Section 301(a) of the Labor Management Relations Act, *supra,* and jurisdiction was properly vested in the first instance in the United States District Court for the Northern District of Illinois, Eastern Division.

REASON FOR GRANTING THE WRIT.

This case presents a significant question concerning the permissible sources on which an arbitrator may base his award under the broad principles enunciated by this Court in the Steelworkers "Trilogy",[3] particularly *United Steel-*

3. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564 (1960).

workers v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). While *Enterprise* established that federal courts will not review the merits of an arbitration decision, it also warned that an award which is not based on the parties' agreement and the "industrial common law" should not be enforced. *Enterprise,* however, left open the question of the particular tests which a reviewing court may apply to determine whether an award "draws its essence from the collective bargaining agreement." The arbitrator's award in the instant case was expressly predicated on three discrete bases, none of which, we submit, falls within the acceptable sources of guidance to which this Court has restricted arbitrators.

The instant case thus provides an appropriate opportunity for this Court to clarify and elucidate upon its caveat in *Enterprise* that an arbitrator may "not sit to dispense his own brand of industrial justice."

A. This Court's Decision in Enterprise.

In the *Enterprise* case, decided nearly a decade ago, this Court reversed a decision of the Fourth Circuit Court of Appeals, which had denied enforcement of an arbitration award, because the Court of Appeals had "merely disagreed with the arbitrator's construction of [the contract]" (363 U. S. at 598). As this Court summarized:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his" (*Id* at 599).

In so holding, however, this Court made clear that arbitration awards should not be automatically enforced by the federal courts:

"Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award" (*Id.* at 597).

B. Sources for Arbitral Guidance.

As this Court noted in *Enterprise*, an arbitrator "may look for guidance from many sources." In a companion case, *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574 (1960), this Court indicated that the permissible sources to which an arbitrator may look are, broadly, twofold: the bargaining agreement itself and the "industrial common law." Thus:

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment" (363 U. S. at 581-82).

To be entitled to enforcement in the federal courts, an arbitration award must be grounded on the collective bargaining agreement. In interpreting that agreement, the arbitrator may draw on the "industrial common law," with reference either to the particular shop involved or the industry as a whole. But if the award is predicated not on

the bargaining agreement but rather on factors extraneous to the contract or the industrial common law, then the arbitrator has not been faithful to his obligation to the parties. To the extent he bases his award on such factors, beyond the realm of his presumed expertise, he is in fact "dispensing his own brand of industrial justice," and his award is not entitled to enforcement.

C. The Instant Case.

In the instant case, the arbitrator expressly based his award on three factors. None of these factors, it is submitted, falls within the grounds of arbitral judgment deemed proper by the Court in *Enterprise*.

1. *The "Unreasonableness" of Plant Rule 7.* The arbitrator by-passed Plant Rule 7, clear on its face and providing for immediate discharge for violation of a penal law on Company premises.[4] He held that the Rule was "unreasonable."[5] According to the arbitrator, "To say [as the Rule does] that discharge is the appropriate penalty for the violation of any penal law is to overlook the obvious fact that penal laws run the gamut from murder to nuisance" (App. C, *infra* p. A19).

The arbitrator, however, ignored Section XII of the parties' labor agreement (p. 4 *supra*) which commits the Union, the Company and its employees to do "every-

4. Illustrating a proper exercise of arbitral functions, the arbitrator looked to the "common law" of the shop to determine that Rule 7, as previously construed, was restricted to convictions of penal offenses on Company property. He thus rejected the Union's claim that Rule 7 was ambiguous when compared with Rule 30, which provided a two-day suspension for gambling (App. C, *infra* p. A18).

5. Rule 7 had not been challenged by the Union for over 20 years. In fact, as the arbitrator found, the Rule was contained in a pamphlet issued for the guidance of union stewards and officials (App. C, *infra* p. A13).

thing within their power to . . . conduct themselves individually and collectively so as to reflect favorably on the business and improve the public standing of the Company and of the Union [and to] promote the sale of the Company's products through grocery stores to the general public." This provision necessarily embraces the idea of avoiding adverse publicity and public opprobrium. It reflects a mutual awareness of the intense competition in the field of "shelf" marketing and a shared sensitivity to consumer attitudes. Clearly, conviction of a penal offense on Company premises is harmful to the Company's public standing by reason of an association in the public's mind between the Campbell plant and criminal conduct. Plant Rule 7, viewed as a means of deterring conduct giving rise to such association, represents a reasonable attempt to enforce the rigid standards of conduct which the parties established for themselves in the agreement.

The arbitrator's opinion shows that he gave no consideration to the parties' agreement in holding Rule 7 "unreasonable." He thus manifested an infidelity to his obligation as an arbitrator, and dispensed his "own brand of industrial justice." For this reason his award should not have been enforced.

2. *The "Modern Tolerant View of Gambling."* Having written into Plant Rule 7 an unjustified and unauthorized distinction between "major" and "minor" penal violations, the arbitrator further concluded that the instant offense, book-making, fell into the latter category. But again the award reveals no reliance by the arbitrator on the labor agreement or the industrial common law in reaching this conclusion. Indeed, the Court of Appeals speculated that the arbitrator's decision on the severity of the offense could have been based in part on "the modern

tolerant view of gambling." To the extent this is so, the arbitrator's judgment was clearly based on an improper factor. As this Court stated in *Warrior & Gulf:*

> "[An arbitrator] has no general charter to administer justice for a community which transcends the parties" (363 U. S. at 581).

If an arbitrator is free to base his award on the general or public attitude toward given conduct, then past practice and consistency in the plant or industry will count for nought in the settlement of industrial disputes. This Court has clearly indicated in the Trilogy that just the converse is the intended norm. Shifting patterns of public acceptance or rejection of given behavior are not within the special expertise of an arbitrator, and should not be permitted to affect the resolution of a contract dispute between the parties.

The agreement itself, and the conditions peculiar to the Company and industry, were the sole sources on which the arbitrator should have relied. By going outside these sources in holding that a gambling conviction is a "minor" affair, the arbitrator rendered his award unenforceable.

3. *The Post-Discharge Conduct of the Grievant.* The arbitrator expressly concluded in his award that he was "[p]roceeding on the premise that Bruno has learned his lesson and if given another chance will henceforth conduct himself in an exemplary manner" (App. C, *infra* p. A19). Again, the arbitrator demonstrated that he relied on a factor extrinsic to the parties' agreement and the industrial common law in formulating his award. The propriety of an employer's action under a contract must, of necessity,

be determined as of the time of that action. Otherwise, a completely arbitrary and unrealistic element is introduced into the employment relationship.

A grievant's conduct after his discharge, outside of the industrial milieu, is irrelevant to the question of whether the discharge was proper. A contract violation, if one occurs, takes place at the time of the discharge. An award which proceeds on the basis of employee conduct occurring *after* the discharge is based on an improper foundation, and for that reason is not entitled to enforcement.

CONCLUSION.

The *Enterprise* case establishes that an arbitration award must draw its "essence" from the bargaining agreement to be entitled to enforcement. If the award is based not on the bargaining agreement and the industrial common law, but instead on extraneous and irrelevant factors, then it is not entitled to judicial enforcement.

In the instant case, the Court of Appeals should have determined that the arbitrator, by rewriting the parties' agreement in accordance with his own standards of "reasonableness," by imposing his conceptions of the severity of the offense where the industrial common law left no latitude for such imposition, and by ultimately basing his award on the post-discharge conduct of the grievant, departed from the standards implicitly imposed by this Court in *Enterprise*. Because the arbitrator's infidelity to his obligations was manifest on the face of the award, the court below erred in granting enforcement.

For the reasons stated above, it is submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 12, 1969.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16924

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL-CIO,
Plaintiff-Appellee,

v.

CAMPBELL SOUP COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 11, 1969

Before HASTINGS, *Senior Circuit Judge,* KILEY and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* The question presented on appeal is whether the district court erred in enforcing an arbitration award restoring an employee to the position from which defendant Campbell Soup Company discharged him because of his conviction of violating an Illinois gambling law. We find no error, and affirm.

Under its Plant Rule 7, Campbell discharged Bruno Kmiec, after his conviction on a guilty plea to a misdemeanor violation of the Illinois gambling laws for tak-

ing bets on its premises. Plaintiff Union,[1] by virtue of its bargaining agreement with Campbell and for the benefit of member Bruno Kmiec, filed a grievance seeking restoration of Kmiec to his position with full back pay. Campbell denied the grievance and the matter was submitted to arbitration. The stipulated arbitration issue was: "Was the discharge of Bruno Kmiec . . . for cause and if not, what remedy is appropriate?" The arbitrator found Kmiec was not discharged for cause and awarded him restoration to his former position without impairment of seniority, but denied him back pay. Campbell refused to reinstate Kmiec, and the Union brought this suit under Sec. 301(a) of the National Labor Relations Act.[2] Campbell answered, relying upon its authority to discharge under Rule 7 and the bargaining agreement, and counterclaimed to vacate the award as invalid and unenforceable.

Both parties made motions for summary judgment. The district court denied Campbell's motion and on authority of *Local 453, Int. Union of Elec. Workers* v. *Otis Elevator Co.*, 314 F. 2d 25 (2d Cir. 1963), granted summary judgment for the Union, ordering Campbell to comply with the arbitrator's award, and ordering the arbitrator to determine what, if any, back pay is due because of Campbell's non-compliance. Campbell's appeal followed.

The issue was submitted by mutual action of the parties and no claim is made that the arbitration was not conducted properly. The arbitrator found these facts: Kmiec

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1. International Association of Machinists, District No. 8, AFL-CIO.

2. 29 U. S. C. § 185 (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

had been a Campbell sheet metal worker since 1946, and had been a Union steward for several years before his discharge. He was arrested in the plant on February 23, 1966, under a charge of "keeping a book" for gambling. He was suspended the same day. The originab charge, a felony, was reduced to a misdemeanor in the Cook County Criminal Court on March 22, 1966. Kmiec pleaded guilty, was fined $100.00 and placed on probation for one year. Campbell fired him on March 31 for violation of Rule 7 of Campbell's Rules for Personal Conduct, which called for a discharge for the first offense of violating any penal law on the Campbell premises.

Campbell challenges the arbitrator's authority to decide Kmiec was not discharged for cause, and to award reinstatement, find him subject to discipline but lessen the penalty imposed by virtue of Campbell Rule 7. It insists that the arbitrator's award is not drawn from the collective bargaining agreement and that he imposed "his own brand of industrial justice" which contravenes the rule in *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960). We think it is clear from the issue submitted to the arbitrator that he was faithful to his obligation and substantially followed the Supreme Court guidelines in *Enterprise. Local 7-644, Oil, Chemical & Atomic Workers* v. *Mobil Oil Co.*, 350 F. 2d 708, 711 (7th Cir. 1965), *cert. denied*, 382 U. S. 986 (1966).

In considering whether Kmiec was discharged "for cause, and *if not*, what remedy is appropriate," (emphasis added) the arbitrator discussed the contentions of the Union and Campbell in relation to Company Rules 7[3] and 30[4] which are promulgated under Campbell's reserved

3. Rule 7 provides for the discharge of an employee who violates a penal law on the premises.

4. Rule 30 provides that an employee who gambles on company premises shall be subject to a warning notice and suspension for two days.

right in Sec. XIII of the labor agreement to "discharge or discipline for cause." He first rejected the Union contentions that Kmiec, a twenty-year employee, was unaware of Rules 7 and 30, and that there was no proof of Kmiec's offense being committed on the premises.

The arbitrator then resolved an apparent "ambiguity" in considering the rules together. He found that Rule 30's "relatively mild punishment" for a gambling offense on the company premises "pulled the rug" from under the Company's contention that a gambling offense was of the "utmost gravity." He decided that the reasonableness of the Rule 7 provision of discharge of "any penal law" could be challenged where the Illinois penal laws ranged from "murder to nuisance" and the discharge applied to a minor offense as well as to a serious one. He stated that "with respect to gambling" the penalties under the two rules were disproportionate.

The arbitrator upon these considerations thought it fitting to take account of the "nature and extent" of Kmiec's offense and his employment background with Campbell. He found one lesser offense and four warnings the only blemishes on an otherwise "by and large . . . very good" record of twenty years of continuous service. He recognized that Kmiec was "vulnerable" to some punishment. But he thought the year's probation granted at the trial of the gambling offense "rationalizes keeping in effect . . . at least for the probation period," the suspension imposed by Campbell after Kmiec's conviction. On the basis that Kmiec had "learned his lesson" the arbitrator decided that the discharge should be converted to a suspension. The award ordered forthwith reinstatement of Kmiec to his job with seniority unimpaired but without back pay from the date of his offense to the date of his reinstatement.

In *Textile Workers* v. *American Thread Co.*, 291 F. 2d 894, 899 (4th Cir. 1961), the court said the arbitrator found implicitly that there was just cause for the discharge. The court, Judge Sobloff dissenting, held that the arbitrator went beyond the terms of submission and that his award which undertook to impose a lesser discipline than discharge should not be enforced. There the discharge was for failure to properly perform the work. This was specified in the bargaining agreement as just cause for discharge. The bargaining contract prohibited the arbitrator from making an award affecting a change, modification, or addition to the agreement. Those provisions are not in the agreement before us and, moreover, the arbitrator here expressly found no just cause for the discharge.

The court in *Truck Drivers and Helpers Union* v. *Ulry-Talbert Co.*, 330 F. 2d 562 (8th Cir. 1964), found that a narrowly restricted arbitration clause precluded the arbitrator from finding the Company justified in disciplining the employee while also finding the discharge an excessive penalty. Similarly, in the recent *Local 342, United Automobile, Aerospace & Agricultural Implement Workers* v. *T. R. W., Inc.* (6th Cir., Oct. 23, 1968), a restrictive arbitration clause was held to preclude the arbitrator from disapproving exercise of the employer right of discharge. The principal distinction between these cases and the case before us is that here there is no restrictive clause expressly limiting the function and power of the arbitrator.

We think that the parties relied upon the arbitrator to "bring his informed judgment to bear in order to reach a fair solution" of the issue under an admittedly broad arbitration clause, "especially [in] formulating remedies." *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 597 (1960). Campbell argues that the arbitrator ignored parts of the agreement which obligated employees to conduct themselves properly so as to enhance

its public image[5] and which reserved to Campbell the "sole responsibility" for maintaining discipline.[6] It does not follow, from the award itself, that these parts of the agreement were ignored. The arbitrator could have thought with good reason, as he apparently did, that sustaining the discharge in the light of Kmiec's record, of the modern tolerant view of gambling, and of the "disproportionate" sanctions in Rules 7 and 30, might adversely affect employee morale and even Campbell's public image. There is nothing in the parts of the agreement referred to, or in the decisions, that preclude this reasoning by the arbitrator, presumably selected because he was informed about identical matters which fitted him for the kind of reasoning he used in resolving the issue.

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5. The agreement provided:

SECTION XII

Objectives of Management and Employees

1. It is agreed that the Union, the employees and the members of the Management staff shall do everything within their power to (1) improve the products of the Company; (2) improve the efficiency of manufacturing; (3) conduct themselves individually and collectively so as to reflect favorably on the business and improve the public standing of the Company and of the Union; (4) promote the sale of the Company's products through grocery stores to the general public.

6. The agreement provided:

SECTION XIII

Rights of Management

Except as herein provided, the right to increase or decrease the working force, to hire, promote, discharge or discipline for cause, lay off for failure to meet Company standards of performance and to maintain discipline and efficiency of employees are the sole responsibilities of the Company, except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the schedule of production, the methods, materials, processes and means of manufacturing are solely and exclusively the responsibility of the Company.

While there are some factual differences between the case before us and the Second Circuit's decision in *Local 453, Int. Union of Elec. Workers* v. *Otis Elevator Co.*, 314 F. 2d 25 (2d Cir. 1963), we think the district court could well have found substantial support, as we have, in the court's reasoning in that decision, with respect to double punishment.

We see no merit in Campbell's argument that the arbitrator exceeded his authority in deciding that the "reasonableness of the punishment" could be challenged and that the conviction was of a lesser offense, or that Kmiec had learned his lesson. Under the broad clause in the bargaining agreement and the direction in the submission the arbitrator was free to do what he did in the award. We have no power to substitute our judgment for that of the arbitrator on the merits. *Local 7-644, Oil, Chemical & Atomic Workers* v. *Mobil Oil Co.*, 350 F. 2d 708 (7th Cir. 1965), *cert. denied*, 382 U. S. 986 (1966). The decision in *Local 217, Int. Union of Elec. Workers* v. *Holtzer-Cabot Corp.*, 277 F. Supp. 704 (D. Mass. 1967), cited in support of its argument, is of no aid to Campbell. There again the restrictive arbitration clause was similar to those in the *Textile Workers* and *Truck Drivers* cases, *supra*.

Finally, we think that Campbell's public policy arguments are without merit. We have already indicated in this opinion that the award could reasonably be expected to further federal policy of industrial peace; and while we—as the Second Circuit in *Otis Elevator*—cannot condone employee gambling activities on the employer's premises, we have been referred by Campbell to no federal policy that required the arbitrator, in exercising his lawful contract power, to approve the discharge of Kmiec or to compel the imposition of harsher sanctions than the award provided under all the circumstances.

With respect to the Illinois policy against gambling, we

are persuaded by the Second Circuits' thesis in *Otis Elevator*, p. 29, that employee Calise's conviction there had "vindicated" the requirement of New York's gambling law and that the award may have further vindicated justice, and that employment plays an important role in implementing the public policy of rehabilitating those convicted of crime which overrides any policy of precluding reinstatement of those "convicted, fined, and subjected to serious disciplinary measure."

For the reasons given, the judgment of the district court, enforcing the award, is affirmed.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

* * (Caption—No. 16924) * *

Tuesday, February 11, 1969

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court enforcing the award, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX B.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT No. 8, AFL-CIO,
Plaintiff,
vs.
CAMPBELL SOUP COMPANY,
Defendant.

No. 67C 970

MEMORANDUM OF DECISION

(Filed Feb. 28, 1968.)

The court has considered the cross-motions of the parties for summary judgment, the briefs in support of and in opposition to such motions, the collective bargaining agreement, and the opinion of the arbitrator. It is the opinion of the court that there is no dispute as to any material issue of fact, and that this case therefore should properly be disposed of on the basis of summary judgment.

The decisions of the United States Supreme Court in *United Steelworkers of America* v. *Enterprise W. & C. Corp.*, 363 U. S. 593, 80 S. Ct. 1358 and *United Steelworkers of America* v. *Warrior & Gulf*, 363 U. S. 574, 80 S. Ct. 1347 set forth the following rules:

(1) All doubts about arbitrability under the contract shall be resolved in favor of arbitration.

(2) The arbitrator may look to guidance from many sources, but his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

(3) A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.

(4) The question of interpretation of the collective bargaining agreement is a question for the arbitrator.

(5) The term "function of management" in a collective bargaining agreement must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.

The collective bargaining agreement at issue is somewhat ambiguous. Article XIII provides that the right to discharge is the sole responsibility of management, "except as herein provided." Article XI provides for the use of the grievance procedure in the event that a discharged employee feels he has been *unjustly* dealt with.

There is no indication that the arbitrator went beyond the scope of the question that was submitted to him. The stipulated question that was submitted asked:

> "Was the discharge of Bruno Kmiec on March 31, 1966 for cause, and if not, what remedy is appropriate."

This was the very question that the arbitrator answered. He concluded the discharge was not for cause, although he found there was cause for a suspension. The court does not find that the arbitrator acted arbitrarily or capriciously or that he exceeded his jurisdiction. Nor can the court find that the arbitrator's award is contrary to public policy simply because the employer is forced to rehire an employee who had engaged in gambling activity.

In *Local 453, International Union of Electrical Workers* v. *Otis Elevator*, 314 F. 2d 25 (1963), the 2nd Circuit considered a situation nearly identical to the one facing this court. The arbitrator's award was affirmed. In the absence of any contrary precedent in the 7th Circuit, this court feels that the Local 453 case is controlling.

For the reasons stated herein the motion of the defendant for summary judgment is denied. The motion of the plaintiff for summary judgment is granted. Counsel for the plaintiff shall submit an appropriate order within ten days.

/s/ WILLIAM J. LYNCH,
Judge, United States District Court.

Dated Feb. 28, 1968

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—No. 67 C 970) * *

ORDER

1. Defendant is ordered to specifically comply with the Report and Decision of Arbitrator Harold M. Gilden, dated May 24, 1967.

2. The court will retain jurisdiction of the case and directs Arbitrator Gilden to hold a hearing to determine what, if any, back pay is due Bruno Kmiec as a result of the company's refusal to comply with his award.

3. Defendant is to pay costs.

/s/ WILLIAM J. LYNCH,
Judge, United States District Court.

Dated April 11, 1968.

APPENDIX C.

IN THE ARBITRATION BETWEEN: CAMPBELL SOUP COMPANY (Chicago, Illinois) and DISTRICT NO. 8, INTERNATIONAL ASSOCIATION OF MACHINISTS, (AFL-CIO)	Before: Harold M. Gilden, Arbitrator

REPORT AND DECISION OF ARBITRATOR

In these proceedings one issue was submitted for an award to Harold M. Gilden, selected by the parties to serve in the capacity of impartial arbitrator herein.

A hearing was held at Chicago, Illinois on December 12, 1966, at which the parties were fully heard. The following appearances were entered:

Union:

Sheldon M. Charone of Carmell & Sherone, Attorneys
James B. O'Brien of Carmell & Sherone, Attorneys
Joseph Butkus, Business Agent, District No. 8, IAM (AFL-CIO)

Company:

James S. Petrie of Vedder, Price, Kaufman & Kammholz, Attorneys
James W. Cameron, Personnel Manager
Robert H. Drew, Manager, Employee Relations

The grievant, Bruno Kmiec, appeared in person and testified on his own behalf.

Post-hearing briefs were filed with the Arbitrator and exchanged between the parties on or about January 23, 1967.

ISSUE.

Was the discharge of Bruno Kmiec on March 31, 1966, for cause and if not, what remedy is appropriate?

NATURE OF CASE.

The grievant, Bruno Kmiec, was hired by the Company on April 8, 1946 in the classification of a sheet metal worker, and he continued to work as a journeyman mechanic in the Maintenance Department up to the date of his discharge.

On February 23, 1966, Bruno was arrested in the plant cafeteria by Chicago police officers on the charge of "keeping a book" for gambling purposes, a felony. He was suspended by the Company on the same day, in accordance with Company policy.

At his trial held March 22, 1966, in the Municipal Court Division, First District, Circuit Court of Cook County, Illinois, the charge was reduced from a violation of Section 28-1(a)5 (Possession of gambling paraphernalia), to a violation of Section 28-1(a)2 (gambling), a misdemeanor. Bruno pleaded guilty to the misdemeanor charge, and was fined $100.00 and placed on one year's probation.

On March 31, 1966, the Company discharged Bruno for violating Rule 7 of the plant's "Rules for Personal Conduct". This rule referred to the violation of any penal law on the premises, and called for dismissal on the first offense.

Rule 7 has been in effect at least since 1945, and is included, together with its penalty, in a handbook for employees issued in November of 1965 to all employees, through placement at distribution points throughout the plant. It is also contained in a pamphlet issued for the guidance of Union stewards and officials.

The grievant had served as a steward for a number of

years and continued to hold this position until January, 1966, shortly before the incident made subject of this dispute. The pamphlet was distributed to all stewards, and the rules were also posted continuously on Company bulletin boards.

Another of the plant rules is Rule No. 30 which prohibits "gambling on Company premises". This provides for a warning notice and a two-day suspension for the first offense, and dismissal for the second.

CONTENTIONS.

The Union says that Bruno had performed highly satisfactory work for the Company for 20 years prior to this discharge; that the Company failed to prove beyond a reasonable doubt that Bruno violated a penal law on the premises; that the grievant pleaded "guilty" to "gambling" but not to gambling on Company property; that where discharge is based on dishonesty, the Company should be held to the highest degree of proof of all elements of the offense; that the arrest on the premises does not indicate that the offense also took place there; that Rules 7 and 30 concerns conduct in the case of gambling, but provides different penalties; that the record is devoid of any evidence that the grievant gambles on Company premises; that Bruno was not tried on the charge of conducting a book on the Company premises, but was tried for gambling; he was not tried for gambling on the Company premises and he pleaded guilty only to the generic charge of gambling; that Rule 7 was intended by the Company to cover those criminal acts which were not specifically referred to in the other rules; that if gambling fell within the ambit of Rule 7, why was there a need to have Rule 30; that Rule 7 is unreasonable and unjust; that by requiring discharge on the first offense of a minor criminal law, Rule 7 is an arbi-

trary exercise of the right to manage; that the Company has already established its attitude towards the seriousness of gambling by its Rule 30 which provides only a warning and a two-day suspension; that discharge is far too extreme a penalty for the first violation of a penal law which is not generally considered a serious one; that considering Bruno's long and honorable work record, his family, and the difficulty of obtaining work at his age, discharge for a first violation of a minor misdemeanor, is far too harsh a penalty; that Bruno should be reinstated with full back pay.

The Company says that there was just cause for Bruno's dismissal; that the offense of which he was convicted was one of the utmost gravity and clearly violated a long-standing plant rule; that the discharge was not only fully justified by Bruno's misconduct, but was compelled under Section XII of the labor contract; that Bruno had actual knowledge, or was chargeable with knowledge, of the Company rules; that his actions and testimony show that he was aware of the content of the Company's rules; that Rule 7 is neither unreasonable nor unjust; that the natural and inevitable corollaries of gambling in the plant are totally disruptive to production and discipline; that the Company was constrained to discharge Bruno to avoid condoning his illicit activities; that Bruno was not discriminated against by being the only one discharged since he was the only employee to be found guilty of penal law violations on the premises; that Bruno's previous good record cannot balance an equally long-standing history of taking bets; that the Company's action was well justified; that the grievance should be denied.

Applicable Contract Provisions.

Section XI.

Discharge Cases.

1. In the event an employee has been discharged and believes that he has been unjustly dealt with, such discharge shall constitute a grievance case arising under the method of adjustment of differences provided herein. Discharge cases may start at Step 3 of the grievance procedure.
2. In cases concerning discharge, the Company will advise the Union as promptly as possible.

Section XII.

Objectives of Management and Employees.

1. It is agreed that the Union, the employees and the members of the Management staff shall do everything within their power to
   (1) improve the products of the Company;
   (2) improve the efficiency of manufacturing;
   (3) conduct themselves individually and collectively so as to reflect favorably on the business and improve the public standing of the Company and of the Union;
   (4) promote the sale of the Company's products through grocery stores to the general public.

Section XIII.

Rights of Management.

1. Except as herein provided, the right to increase or decrease the working force, to hire, promote, discharge or discipline for cause, layoff for failure to meet Company standards of performance and to maintain discipline and efficiency of employees are the sole responsibility of the Company, except that Union members shall not be discriminated against as such. In addition, the products to be manufactured, the schedules of production, the methods, materials, processes and means of manufacturing are solely and exclusively the responsibility of the Company.

Rules for Personal Conduct.

Disciplinary Offenses.

Offenses	First	Second	Third
No. 7 Violation of any penal law on the premises.	Dismissal		
No. 30 Gambling on Company premises	Warning Notice and suspension 2 days	Dismissal	

Discussion.

After 20 years as an employee, and many of these as a Union steward, Bruno's claim that he was unaware of the existence of the Company rules for personal conduct, must be rejected out of hand. The rules had been well publicized, and they were in existence prior to the time Bruno started work in 1946. Whether Bruno actually knew of the rules

or not, he is certainly chargeable with knowledge of their contents. The Company could do little more than it had done to publicize the existence of these rules and Bruno must be held responsible for knowledge of them and their effect.

The allegation that there is no proof that Bruno violated any penal law on the premises of the Company, lacks validity. In his testimony, Bruno admitted that he took and placed bets while on Company property, and that he had been engaged in gambling activities in the plant on a daily basis over a considerable period of time. The facts from which the charge arose placed the illegal action on the Company premises, and the guilty plea, even to the lesser charge, was to action committed on Company premises.

At first glance, there appears to be ambiguity and contradiction as between Rule 7 and Rule 30. In Illinois, as contrasted to many "lottery" states, gambling in any form is forbidden by statute. In Illinois, it would be impossible to violate Rule 30 without violating Rule 7 at the same time, and by the same actions. Thus, a violation of Rule 30 by an employee at the Chicago plant would in and of itself constitute a violation of Rule 7. The Company's testimony to the effect that Company policy is to suspend, awaiting the results of the trial, any employee who is charged, in court, with a penal law violation, makes it clear that Rule 7 has been construed, by the Company, to mean, "conviction" of the violation of a penal law. In this light, Rule 7 and Rule 30 are compatible and any ambiguity between the two, is dispelled.

Still, at least with respect to gambling, the prescribed penalty for a violation of Rule 30, is far out of proportion to that which is designated for a violation of Rule 7. A meaningful comparison can hardly be made between a two-day suspension and a discharge. The relatively mild punishment for a first offender on a Rule 30 violation, pulls

the rug out from under the Company assertion that gambling is an offense of the "utmost gravity". To say that discharge is the appropriate penalty for the violation of any penal law, is to overlook the obvious fact that penal laws run the gamut from murder to nuisance. Where, as here, a single penalty is designated (and the ultimate penalty at that) for the violation of a rule so broad as to encompass all possible penal laws of the state, the reasonableness of the punishment may properly be challenged.

It is fitting therefore to take cognizance of the nature and extent of Bruno's misdeed in the context of his entire employment background. Except for the instant infraction, Bruno's record of almost 20 years of continuous service with the Company, by and large, is very good. Only four warning notices stand to mar what otherwise would be an unblemished record. Then too, it should be recognized that his conviction was for one of the lesser offenses within the immense spectrum of "Penal Laws".

Considering that Bruno did knowingly and continuously violate both Rule 30 and Rule 7, he is vulnerable to some measure of disciplinary punishment. The circumstances that the Trial Judge placed Bruno on one year's probation rationalizes keeping in effect at least until March 22, 1967, the suspension that was initially imposed on February 23, 1966. This was one way of making certain that Bruno observed the terms of the probation and therefore was entitled to be automatically released therefrom at the expiration of the one-year probationary span.

Proceeding on the premise that Bruno has learned his lesson and if given another chance will henceforth conduct himself in an exemplary manner, it is the considered opinion of the Arbitrator that the discharge should be converted to a suspension pursuant to the terms of the following award.

AWARD.

1. That the discharge of Bruno Kmiec on March 31, 1966 was not for cause.
2. That the Company forthwith shall reinstate Bruno Kmiec to his former job with his seniority unimpaired, but without any back pay for any wage loss that he may have incurred during the period extending from February 23, 1966 up to and including the date of his reinstatement.

Respectfully submitted,

/s/ HAROLD M. GILDEN
Harold M. Gilden, Arbitrator

Chicago, Illinois

May 24, 1967.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 106

CAMPBELL SOUP COMPANY,
Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL-CIO,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Attorneys for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1385.

CAMPBELL SOUP COMPANY,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 8, AFL-CIO,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPINIONS BELOW.

Correctly stated in the petition.

JURISDICTION.

Correctly stated in the petition.

QUESTION PRESENTED.

The questions presented by petitioner do not fully and sufficiently describe the issues. The question more adequately formed would be:

Whether an arbitrator acting under a broad delegation

of authority, after a full and regular hearing, who reinstates an employee who has breached a company rule against gambling was faithful to his obligation and substantially followed this Court's guide lines.

ARGUMENT.

This Court is asked to review an order of the Seventh Circuit enforcing a run of the mill arbitration award. The agreed issue to be decided by the arbitrator was whether the grievant was discharged for cause, and if not, what would be the proper remedy. The arbitration clause was almost identical to that in *Enterprise*[1] and falls within the ambit of the normal type of arbitration clause which this Court has characterized as the "standard form of arbitration clause."[2]

The arbitrator acting under this broad delegation found that the discharge was improper and ordered that the employee be reinstated without back pay.

1. There Is No Conflict In The Circuits.

Judge Marshall's decision in *Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.*, 314 F. 2d 25 (2nd Cir. 1963), *cert. den.*, 373 U. S. 949 (1963), was relied upon by the Seventh Circuit with the observation that:

> . . . while there are some factual differences between the case before us and the Second Circuit's decision, we think the District Court could well have found substantial support, as we find, in the court's reason-

1. *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593, 594 (1960).

2. *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 571 (1960).

ing in that decision, with respect to double punishment.[3]

Judge Lynch, in granting plaintiff's motion for summary judgment, observed that:

> In *Otis Elevator,* the Second Circuit considered a situation nearly identical to the one facing this court. The arbitrator's award was affirmed. In the absence of any contrary precedent in the Seventh Circuit, this court feels that the *Local 453* case is controlling.[4]

Petitioner makes the same arguments which were raised in the *Otis* petition for certiorari. All that has happened since this Court denied certiorari in *Otis* in 1963 is the full acceptance of the Second Circuit *Otis* precedent by the Seventh Circuit.

2. The Arbitrator Did Not Act Arbitrarily Or Capriciously Nor Did He Impose His Concepts Of Justice.

It is argued that the arbitrator dispensed his "own brand of industrial justice" by disregarding a long standing rule, by finding the rule unreasonable, and by considering the employee's post discharge conduct in determining whether discharge was the proper remedy.[5]

The Seventh Circuit rejected this contention with the comment:

> We think it is clear from the issue submitted to the arbitrator that he was faithful to his obligation and substantially followed the Supreme Court guidelines in *Enterprise.*[6]

---

3. Petitioner's Appendix A, p. A7, hereinafter referred to as P. A.

4. P. A., p. A11.

5. Petition, p. 2.

6. P. A., p. A3.

The almost identical arguments were rejected by Judge Marshall in *Otis* when he held:

> Having bargained for the decision of the arbitrator on the question whether [the grievant's] conduct and criminal conviction constituted "just cause" for discharge, the parties are bound by it even if it be regarded as unwise or wrong on the merits . . .
>
> * * * * *
>
> To separate the just cause for discharge from the injust was precisely what the parties clothed the arbitrator with the authority to do. If the employer wanted the automatic right to discharge an employee for violation of certain company rules or for the commission of certain crimes, whether on or off the company premises, it had the opportunity to seek such an explicit exclusion from the general arbitration clause when the collective bargaining agreement was negotiated, as it may do when the collective bargaining agreement expires.
>
> In the absence of such a clause, the decision of the arbitrator in the present case must be taken as conclusively establishing as a matter of contract interpretation that the discharge of [the grievant] was not for just cause and as foreclosing judicial review of the merits of the question.[7]

Judge Kiley, speaking for the Seventh Circuit, almost echoed Judge Marshall's conclusions by stating:

> We see no merit in Campbell's argument that the arbitrator exceeded his authority in deciding the "reasonableness of the punishment" could be challenged and that the conviction was of a lesser offense, or that Kmiec had learned his lesson. Under the broad clause in the bargaining agreement and the direction in the submission, the arbitrator was free to do what he did in the award. We have no power to substitute our judgment for that of the arbitrator on the merits.[8]

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7. *Otis*, at 28.
8. P. A., p. A7.

CONCLUSION.

For the foregoing reasons and because the national policy of encouraging arbitration can be best effectuated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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